85-1764

No.

Supreme Court, U.S.
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CLERK

In the Supreme Court of the United States

October Term, 1985

GEORGE D. BUCK,
Petitioner,
vs.
STATE OF KANSAS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER EVIDENCE OF A PRIOR EXTRINSIC OCCURRENCE, UPON WHICH THE DEFENDANT HAS PREVIOUSLY BEEN TRIED AND ACQUITTED, SHOULD BE ADMISSIBLE AGAINST HIM IN A SUBSEQUENT CRIMINAL TRIAL.

PARTIES TO THE PROCEEDINGS BELOW

STATE OF KANSAS, Plaintiff - Appellee - Respondent
GEORGE D. BUCK, Defendant - Appellant - Petitioner

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

None of the opinions or decisions germane to this petition have been published in official or unofficial reports.

A copy of the trial court's order, sustaining the State's motion to use evidence of other crimes, is attached hereto as Appendix A. (Johnson County District Court Case No. K-45936).

A copy of the unpublished Kansas Court of Appeals decision affirming the trial court order is attached hereto as Appendix B. (Appellate Case No. 57,727).

A copy of the unpublished Kansas Supreme Court decision denying your petitioner's Petition For Review is attached hereto as Appendix C. (Appellate Case No. 85-57,727-A).

GROUNDS FOR SUPREME COURT JURISDICTION

On June 8, 1984, in the District Court of Johnson County, Kansas, Case No. K-45936, Honorable William G. Gray, district judge presiding, issued his order allowing the State to use certain evidence from an alleged prior crime upon which this petitioner had previously been tried and acquitted.

Following his conviction and sentencing, the petitioner perfected a timely appeal. On December 31, 1985, the Kansas Court of Appeals issued its *per curiam* unpublished opinion under Case No. 57,727, affirming the judgment of the trial court.

Pursuant to Kansas rules and procedure, the petitioner sought review of the Court of Appeals decision in the Kansas Supreme Court. The Kansas court of last resort issued its decision denying the petition for review on February 28, 1986.

Petitioner submits that jurisdiction for the instant petition for writ of certiorari is conferred upon this Court by virtue of 28 U.S.C. Sec. 1257(3), which reads:

> "By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States."

Furthermore, jurisdiction is appropriate pursuant to Sup. Ct.R. 17.1(b) and Sup.Ct.R. 17.1(c) which indicate as follows:

> "(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals."

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The instant petition is timely pursuant to 28 U.S.C. Sec. 2101(d), Sup.Ct.R. 20.1 and Sup.Ct.R. 20.4, being filed within sixty (60) days of the date of final decision by the Kansas Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution reads, in pertinent part, as follows:

"[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property, without due process of law. . . ."

Such amendment being previously held applicable to the States by virtue of the Fourteenth Amendment to the United States Constitution, Sec. 1, which provides:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

(See *Duncan v. Louisiana*, 391 U.S. 145, 147-148, 20 L.Ed.2d 491, 495, 88 S.Ct. 1444 [1968]).

STATEMENT OF THE CASE

This is a criminal matter wherein the petitioner was tried before a jury, convicted, and sentenced for the offense of taking indecent liberties with a child, in violation

of K.S.A. 1983 Supp. 21-3503, a class "C" felony. The petitioner was sentenced to a period of 3-10 years incarceration. He is presently in the custody of the Kansas Secretary of Corrections.

Prior to trial, the prosecutor filed a motion pursuant to K.S.A. 60-455 seeking to introduce evidence of prior crimes against the petitioner. The trial court sustained that motion over the objection of the petitioner by its order filed June 8, 1984. That order is set out in Appendix A hereto.

Again, prior to hearing evidence on the day of trial, September 17, 1984, the trial court entertained arguments by petitioner's counsel seeking to convince the court to reverse its earlier ruling. Petitioner's counsel advised the trial court that the admission of evidence from an alleged crime for which the petitioner had already been tried and acquitted violated federal constitutional law. The trial judge again overruled the petitioner's objections and allowed the respondent to use the objectionable evidence. (Trial Transcript, September 17, 1984, 9:14-24:9).

After conviction and sentencing in the instant case, petitioner raised his constitutional arguments in the Kansas Court of Appeals and Kansas Supreme Court all to no avail.

The petitioner was charged with the offense of taking indecent liberties with one Casey Eppler. The State called seven witnesses in its case in chief. Three witnesses testified as to the incident charged. Four other witnesses testified for the State regarding a prior alleged incident. The petitioner testified on his own behalf.

Casey Eppler, the alleged victim in the instant case, was a five year old boy who testified, in substance, that

he sat on the petitioner's lap while the petitioner was tuning the Epplers' piano. Casey said that the petitioner reached inside his underwear and "rolled his finger around my weinie."

The petitioner, George D. Buck, is a seventy year old man who worked as a piano tuner. On the date of this alleged incident, January 25, 1984, Mr. Buck went to the Eppler house in Overland Park, Kansas to tune an antique Mason-Hammond upright piano. The piano had not been tuned in several years and had melted candle wax all over the strings, dampers and hammers. To make matters worse, Mr. Buck's wife was bedridden and needing nearly constant care and attention from the petitioner (she died shortly after this incident). A job, which normally takes forty-five minutes, due to the condition of the piano, a temporary power outage at the home, his anxiety over being absent from his wife, and the antics of the alleged victim, became an hour and forty-five minute ordeal.

Mr. Buck testified that Casey was a nuisance and "one of the most obnoxious kids I have run into in a long time." He kept messing with the petitioner's tools, climbing on the piano, and, several times, had to be run off by the petitioner. Mr. Buck said he never touched the boy's private parts, although he did admit to grabbing the child to remove him from the work area.

To prove its case against Mr. Buck, the respondent was allowed, over objections, to introduce evidence regarding a prior incident for which Mr. Buck had already been accused, tried and *ACQUITTED*. The State, in the instant case, really *retried* the petitioner on the prior complaint. The State used four of its seven witnesses to testify about the prior incident for which the defendant had already once been placed in jeopardy. The State introduced

the testimony of Danyelle Christie Hinkle (seven years old), Damien Jason Hinkle (ten years old), and Debbie Hinkle (thirteen years old) to reallege that *in August of 1982* Mr. Buck had touched them sexually. Furthermore, Olathe Police Detective Melvin E. Richey was allowed to testify and cumulatively corroborate the prejudicial testimony of the Hinkle children.

The Trial Judge had allowed this testimony under K.S.A. 60-455 to prove "motive, intent or absence of mistake or accident." (Order Sustaining Motion Pursuant to K.S.A. 60-455, June 8, 1984). The jury was given a limiting instruction.

Ultimately, the State succeeded in getting the jurors sufficiently angry at Mr. Buck. They returned a verdict of guilty.

REASONS FOR ALLOWANCE OF THE WRIT

Regardless of the mental gymnastics we lawyers relish, the only purpose for allowing evidence of other misconduct into a criminal trial and the only actual result ever created in the minds of lay jurors is prejudice against the criminal defendant. As the Kansas Supreme Court advised in our leading case dealing with the subject.

> "The rule limiting evidence of other crimes and civil wrongs in a criminal case is to be strictly enforced." *State v. Bly,* 215 Kan. 168, Syl. ¶ 2, 523 P.2d 397 (1974).

The Court explained further that evidence of other offenses or civil wrongs is not to be admitted without a good, sound reason. (p. 175) The only "reason" the State had for using the objectionable evidence regarding

the Hinkle affair in the instant case was that the prosecutor knew he had a weak position with Casey Eppler's testimony alone and realized that the Hinkle accumulation would sufficiently enflame the jury to convict.

The main problem with using evidence of the Hinkle incident in the instant case is that it violates the defendant's Fifth Amendment right to be free from double jeopardy. The defendant was already tried for that incident. The State already took its best shot at Mr. Buck in a prior trial using the Hinkle children and a jury acquitted.

The absolute sweep of the federal double jeopardy clause is made applicable to the states by virtue of the Fourteenth Amendment. *Brown v. Ohio,* 432 U.S. 161, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977). The federal constitutional requirements in criminal cases are governed by federal standards.

In the leading case of *Ashe v. Swenson,* 397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 (1970), this Court said that the Fifth Amendment protection against double jeopardy protects a man once acquitted from having to "run the gauntlet" a second time. Traditional double jeopardy became an enlightened concept and the constitutional protection was broadened. In that case the Court made it clear that the doctrine of collateral estoppel was embodied in the double jeopardy clause. The State of Missouri in *Ashe* attempted to ignore a prior acquittal wherein the only conceivable issue in dispute was whether the defendant had robbed one of six poker players when it subsequently prosecuted that defendant for the robbery of the other players. The Court held that an issue of ultimate fact once determined in litigation by a valid and final judgment cannot be relitigated between the same parties in a sub-

sequent lawsuit. The Court did not envision a hypertechnical or restrictive approach to the doctrine which might eliminate its applicability in criminal law, but rather suggested a more realistic and rational approach. This Supreme Court in *Ashe v. Swenson* clearly broadened the protection afforded by the double jeopardy clause.

In the Hinkle case tried against Mr. Buck (Kansas District Court of Johnson County, Case No. K-43021) the ultimate issue of the petitioner's culpability or the offensive nature of his alleged conduct had been determined in his favor. He should not have been required to once again defend himself against the same set of facts proved in a subsequent trial. He should not have been thrust into that same gauntlet again.

The federal case of *Albert v. Montgomery,* 732 F.2d 865 (11th Cir. 1984) seems to be a case directly on point. The court, in a federal habeas corpus case involving a Georgia penitentiary inmate, wrote as follows:

> "Although Georgia law permits the introduction of evidence concerning prior similar acts, even those for which a defendant has been acquitted, as evidence of identity or motive, *see Rivers v. State,* 147 Ga. App. 19, 248 S.E.2d 31 (1978), it is clear that the Supreme Court and this court have held that the principle of Collateral estoppel prevents the introduction of such evidence for *any* purpose.
>
> "collateral estoppel means simply that once an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future law suit. *Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). The Supreme Court has held this concept of collateral estoppel to be embodied in the fifth amend-

ment guarantee against double jeopardy. *Id.* at 445, 90 S.Ct. at 1195, 25 L.Ed.2d at 476.

"This court has embraced the holding of *Ashe* to consistently emphasize that a defendant should not be forced to defend against charges or factual allegations which he overcame in an earlier trial. *See United States v. Mulherin,* 710 F.2d 731 (11th Cir. 1983); *United States v. Whitaker,* 702 F.2d 901 (11th Cir. 1983); *United States v. Mock,* 604 F.2d 341 (5th Cir. 1979); *Blackburn v. Cross,* 510 F.2d 1014 (5th Cir. 1975); *Wingate v. Wainwright,* 464 F.2d 209 (5th Cir. 1972). The Court in *Wingate* stated that:

> It is fundamentally unfair and totally incongruous with our basic concepts of justice to permit the sovereign to offer proof that a defendant committed a specific crime which a jury of that sovereign has concluded he did not commit. Otherwise, a person could never remove himself from the blight and suspicious aura which surrounds an accusation that he is guilty of a specific crime.

Wingate v. Wainwright, 464 F.2d at 215." (pp. 869-870) (emphasis original).

It is difficult to imagine, in an emotionally charged case such as one involving an alleged sexual perversion with a child of tender years, anything more devastating than the accusation that the criminal defendant has committed the alleged act on a prior occasion. The problem is that the question of this petitioner's alleged perversity on a prior occasion had already been decided in his favor.

In the instant case, the trial court reasoned that the jury in the earlier case might have based its acquittal on "the credibility of witnesses or a number of factors other

than the issues of motive, intent or absence of mistake or accident." (Order, June 8, 1984). The problem with such reasoning is that it eviscerates the effect of the prior acquittal. *How* the jury decided is not the issue. We are concerned with *what* was decided.

As the Eleventh Circuit has said, evidence of the prior incident which was already tried and resolved by an acquittal should not be introduced for *any* purpose. Our courts should not bend over backwards or stretch their reasoning power to the limits of conjecture in order to find any remotely conceivable way for the State to win a conviction. Limitation of this type of evidence is to be strictly enforced. Penal provisions are not to be liberally construed.

In the Hinkle incident it was once established that the defendant's conduct, participation, state of mind and ultimate culpability did not breach the requirements of the criminal law. It is, therefore, patently unfair to use the same evidence in a later trial to establish the existence of culpability in another incident. Regardless of whose story was believed or what evidence the jury accepted in the prior case, George D. Buck was not guilty of a crime. He was acquitted of the alleged misconduct.

As the Court in *United States v. Keller,* 624 F.2d 1154 (3rd Cir. 1980), wisely pointed out, the rationale for incorporating collateral estoppel into the double jeopardy clause [and thereby broadening the traditional concept] is based on the notion that harassment of the individual by the sovereign is a thing to be discouraged. The Court refused to burden that defendant again with an issue he had already litigated, successfully defended, *and won.* The Court refused to allow the government to use evidence from a prior incident which resulted in an acquit-

tal to prove its case for a subsequent offense. Remember: The Bill of Rights is a limitation on the power of the government.

In the case of *United States v. Mespoulede,* 597 F.2d 329 (2nd Cir. 1979), the Court refused to allow the prosecution to use evidence of a prior incident for which the defendant had been exonerated to prove their case against him on another charge. The Second Circuit's reasoning is particularly persuasive.

> "We do not rest our decision on the force of precedent alone. To put it bluntly, to refuse to allow the assertion of collateral estoppel in this case would simply be inequitable. This is not a situation in which the second suit is civil in nature, where the defendant faces sanctions or penalties of quite a different order than those he escaped through acquittal on criminal charges. Here, Mespoulede is once again faced with criminal sanctions that, realistically, may be imposed in large part because the second jury is persuaded that he possessed cocaine on January 31.
>
> "To be sure, he is now being tried for conspiracy, but the evidence of possession was introduced to persuade the second jury of the same fact already litigated and resolved in Mespoulede's favor—that he was cutting and packaging cocaine on January 31. Although we can never know how much weight the evidence of possession on January 31 carried with the second jury, from the standpoint of the double jeopardy clause the key fact is that Mespoulede was subjected to a second risk of conviction for his actions on January 31. No less than in the first trial, Mespoulede had to confront an assertion that he possessed cocaine on that date.

> "As the specific issue subject to relitigation looms larger in the Government's case, it becomes more likely that the matter will prove decisive in the jury's deliberations. On the other hand, if, as the Government contends, the evidence of possession 'was only some evidence of one among many instances of the defendant's actual possession of cocaine,' then we are at a loss to see how barring the evidence of one particular transaction will harm the prosecution." (p. 377).

In the instant case, 4/7th of the State's evidence dealt with the prior incident of alleged misconduct and perversity. No less than in his prior trial, George Buck had to confront the assertions of the Hinkle children and run the risk of conviction built upon their testimony. There can hardly be a question that the conviction in the instant case rested in large part on the jury's belief that George Buck had committed the same offense in 1982. It is simply inequitable and a violation of the constitutional double jeopardy bar to expose the petitioner once again to criminal sanctions by presenting to a second jury the facts of the prior incident wherein the petitioner was absolved.

We must bear in mind that legal double talk and fictional jurisprudence have no place in the criminal arena where life and liberty are at stake. Such intricacies have no practical effect on jurors anyway. We do not need to stretch our imaginations in order to devise new schemes of jurisprudence for easier convictions. Every one of us realizes that the only purpose for adducing the Hinkle testimony was to enflame and to prejudice the jury. The reality is that by allowing such evidence under the guise

of K.S.A. 60-455 relevancy, the defendant is forced to re-defend himself against prior accusations of misconduct at the risk of criminal sanctions. There is no way that this or any Court could say beyond a reasonable doubt that this jury would have reached the same result without the Hinkle children and Detective Richey. And that, as a practical matter and ungyrated jurisprudence, amounts to unconstitutional double jeopardy and requires a reversal of the conviction herein.

As stated before, the only real effect and intention for introducing evidence of the Hinkle allegations was to attempt to establish a propensity for sexual deviance on the part of the petitioner and prejudice the jury against him.

Surely we all agree that there is a highly prejudicial effect in the introduction of such evidence. But query: What is its probative value? Answer: It simply does not have any.

In order for prior conduct to have a tendency in reason to establish a material fact in issue (i.e. have probative value) such conduct *cannot* be equally consistent with an innocent explanation. In this case, the prior conduct is not only consistent with an innocent explanation, IT HAS ALREADY BEEN DEEMED INNOCENT BY A DULY EMPANELED JURY. Such evidence has no tendency in reason to now establish criminal culpability in the Eppler matter. Its *only* function and effect was prejudice.

As another court said in the case of *State v. Holman*, 611 S.W.2d 411 (Tenn. 1981),

> "For such evidence to have any relevance or use in the case on trial, the jury would have to infer that,

> despite the acquittal, the defendant nevertheless was guilty of the prior crime. No such inference can properly be drawn from an acquittal. . . .
>
> "Having been acquitted of the alleged prior crime, the defendant cannot be tried a second time for that offense; yet, if evidence of such alleged prior crime is admitted in the case on trial, the defendant is required to do just that; at the second trial he must defend himself not only against the charge at hand but also against inferences that the jury might draw from the evidence that he committed the prior crime although he has been acquitted of it."

Such a situation cannot be permitted.

The trial courts of Kansas and these United States should not be permitted to engage in a hypertechnical analysis of issues in a traditional collateral estoppel sense. Rules applicable in civil matters involving only money or property can have drastic, unjust consequences in the criminal setting. Hypertechnical analysis of prior cases to determine issues decided under general verdicts, as was done in the instant case, leaves too much room for result-oriented jurisprudence. Hypertechnical analysis in a traditional collateral estoppel sense makes it too easy for a trial judge to decide that a prior jury was simply devoid of logic when it acquitted a defendant and that his own reason and estimation of the probative value of the prior evidence should now prevail.

Such a rule cannot be sustained.

The ruling in the instant case and decisions of the Kansas Courts are in direct conflict with the United States Constitution's Fifth Amendment, prior decision of the Federal Courts of Appeals, and of this Supreme Court.

As the eminent Kansas jurist and United States Supreme Court Justice David Josiah Brewer said some ninety-five years ago,

> "The wisdom of government is not in protecting power, but weakness: The true end of government is the protection of the individual; the majority can take care of itself."

Upon these arguments and authorities, your petitioner respectfully requests that this Court take jurisdiction of the instant matter on Writ of Certiorari to the Supreme Court of the State of Kansas.

Respectfully submitted,

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of April, 1986, I authorized service of three copies each of the above and foregoing Petition for Writ of Certiorari and Appendices upon Mr. Stephen Tatum, Assistant District Attorney, Johnson County Courthouse, Olathe, Kansas 66061, and the Honorable Robert Stephan, Kansas Attorney General, Kansas Judicial Center, Topeka, Kansas 66612, by having the same, so addressed, deposited in the United States Mail, postage prepaid.

DAVID R. GILMAN
JAMES F. VANO

APPENDIX

APPENDIX A

(Filed June 8, 1984)

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS

STATE OF KANSAS,
Plaintiff,

vs. Case No. K45936

GEORGE D. BUCK,
Defendant.

ORDER SUSTAINING MOTION PURSUANT TO K.S.A. 60-455

The Court has considered the transcript of jury trial proceedings in Kansas Case No. K43021, the transcript of preliminary hearing proceedings in this case and statements and arguments of counsel. The Court has further considered the testimony of Detective Melvin Richey, Parole Officer Beverly Cripe and the records of the Missouri Division of Probation and Parole in reference to Missouri Case No. 101067-2416M. The Court finds that evidence that the defendant committed a crime as alleged in previous Kansas Case No. K43021 and Missouri Case No. 101067-2416M is admissible and relevant to prove motive, intent, or absence of mistake or accident in the above-captioned case.

The Court finds that such evidence is admissible although the defendant was acquitted in the prior Case No. K43021; that the jury in said prior case could have based

its verdict on the credibility of witnesses or a number of factors other than the issues of motive, intent or absence of mistake or accident. Accordingly, the Court finds that the doctrine of collateral estoppel does not apply. The Court further finds that the crime alleged is a specific intent crime and that the elements of motive, intent or absence of mistake or accident will be in issue under the anticipated testimony. The findings herein made are controlling rulings by the Kansas Supreme Court in *State v. Darling,* 197 Kan. 471 (1966), *State v. Bly,* 215 Kan., 168 (1974), and *State v. Irons,* 230 Kan. 138 (1981).

The Court directs that evidence pursuant to K.S.A. 60-455 shall not be offered by the plaintiff in this case until the conclusion of all other testimony. The within ruling is subject to modification if the testimony offered by the plaintiff does not support the admission of such evidence. The Court further directs that evidence pursuant to K.S.A. 60-455 shall not be presented in the presence of the jury until the Court has given a specific instruction to the jury as to the basis and reason for the admission of such testimony.

IT IS THEREFORE BY THE COURT ORDERED that evidence that the defendant committed a crime on a specified occasion as set out in Kansas Case No. K43021 and in Missouri Case No. 101067-2416M is admissible and relevant in this case to prove motive, intent or absence of mistake or accident. This ruling is subject to further review and modification upon the receipt of all other evidence presented by the plaintiff.

/s/ William G. Gray
WILLIAM G. GRAY
Judge of the District Court

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the above and foregoing Order Sustaining Motion Pursuant to K.S.A. 60-455 to each of the following named persons, this 8th day of June, 1984, by United States mail:

Joseph Cosgrove
Assistant District Attorney
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Olathe, Kansas 66061

David R. Gilman
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/s/ Lanell M. Pruett
Lanell M. Pruett
Administrative Assistant

APPENDIX B

(Filed December 31, 1985)

NOT DESIGNATED FOR PUBLICATION

No. 57,727

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

GEORGE D. BUCK,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court: WILLIAM G. GRAY, judge. Opinion filed December 31, 1985. Affirmed.

James F. Vano and *David R. Gilman,* of Overland Park, for appellant.

Joseph E. Cosgrove, Jr., assistant district attorney, *Dennis W. Moore,* district attorney, and *Robert T. Stephan,* attorney general, for appellee.

Before ABBOTT, C.J., BRISCOE, J., and STEVEN P. FLOOD, District Judge, assigned.

Per Curiam: This is a direct appeal by the defendant, George D. Buck, from his conviction of indecent liberties with a child in violation of K.S.A. 1984 [sic] Supp. 21-3503(1)(c). The sole issue on appeal is whether the trial court erred in admitting evidence of prior crimes for which the defendant had been tried and acquitted.

The defendant's appeal focuses on a two-prong analysis of the evidentiary question before this court. First, defendant argues that the prior crimes evidence is constitutionally impermissible under the Fifth Amendment's protection against double jeopardy. Second, defendant contends that the prior crimes evidence was inadmissible under the law of evidence and K.S.A. 60-455 because the evidence's probative value is clearly outweighed by its prejudicial effect.

The double jeopardy argument is based on the following facts. Defendant is a 69-year-old piano tuner. The incident for which defendant was convicted in this case occurred on January 25, 1984. The offense involved a 5-year-old boy, the son of a couple who had employed defendant to tune their piano. The 5-year-old boy testified that the offense occurred while he was alone with the defendant and that the defendant reached inside his clothing and fondled his penis.

The State spent nearly 40 percent of its trial time offering evidence by three alleged victims and the investigating officer of an incident that was alleged to have occurred in August of 1982. Over the defendant's objection, the three children were permitted to testify that the defendant had touched them while he was in their home to tune their parents' piano. The defendant had been tried for those offenses. His defense at trial had been that any touching was accidental and not with an intent for sexual gratification. The jury returned a verdict of not guilty. In this case, defendant denied placing his hand inside the clothing of the 5-year-old boy and testified that any touching was accidental and occurred while he was moving the boy out of his way. In the prior case, the evidence was that any touching that occurred was

through the clothing and no attempt was made to place his hand inside the clothing of any of the alleged victims.

A limiting instruction was given concerning the prior crimes, and no issue is raised concerning that instruction.

An acquittal, standing alone, does not bar admissibility of prior crimes evidence. A conviction is not required under Kansas law for evidence of prior offenses to be admissible. *State v. Irons,* 230 Kan. 138, 139, 630 P.2d 1116 (1981); *State v. Myrick & Nelms,* 228 Kan. 406, 420, 616 P.2d 1066 (1980); *State v. Henson,* 221 Kan. 635, 644, 562 P.2d 51 (1977); *State v. Bly,* 215 Kan. 168, 177, 523 P.2d 397 (1974).

Nevertheless, the presence of an acquittal in a prior crime may operate to bar the evidence under the doctrine of collateral estoppel. In *Ashe v. Swenson,* 397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 (1970), the United States Supreme Court held that the doctrine of collateral estoppel was embodied in the Fifth Amendment's guarantee against double jeopardy. Thus, the admissibility of the prior crimes evidence must take into account this additional consideration—collateral estoppel as a constitutional safeguard. The collateral estoppel approach as described and applied in *Ashe* requires the trial court to " 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' " 397 U.S. at 444.

The trial court in this case examined the record of the previous trial that resulted in a verdict of not guilty. The record before us does not contain the transcript from the prior trial. The appellant has the burden of proving

that the prior acquittal resolved the issue in his favor which the State is trying to prove by admission of the prior crimes evidence. *United States v. King,* 563 F.2d 559, 561 (2d Cir. 1977). It is incumbent upon the appellant to include in the record on appeal the transcript from the prior acquittal to facilitate appellate review. *United States v. Smith,* 446 F.2d 200 (4th Cir. 1971). It is incumbent upon the defendant to furnish a record which affirmatively shows reversible error. *State v. Lee,* 221 Kan. 109, 558 P.2d 1096 (1976). Without an adequate record, we cannot undertake a meaningful review of the trial court's determination of what issues were presented and resolved in the prior trial, and thus we cannot say the trial judge erred in admitting the evidence.

In any event, it appears the evidence would not be barred by collateral estoppel based on the reasoning expressed in *Sealfon v. United States,* 332 U.S. 575, 92 L.Ed. 180, 68 S.Ct. 237 (1948); *Oliphant v. Koehler,* 594 F.2d 547 (6th Cir. 1979); *United States v. King,* 563 F.2d 559; *United States v. Addington,* 471 F.2d 560 (10th Cir. 1973); *State v. Darling,* 197 Kan. 471, 419 P.2d 836 (1966); see discussion of *State v. Darling* in *State v. Irons,* 230 Kan. at 143.

A three-prong test has been established for determining whether evidence of prior crimes is admissible. First, the trial court must determine that the prior crime is *relevant* to prove one of the eight elements specified in the statute. Second, one of the eight elements for which prior crimes evidence is admissible must be *substantially in issue.* And third, the trial court must *balance the probative value* of the prior crimes evidence *against its prejudicial effect* on the jury. *State v. Faulkner,* 220 Kan. 153, 551 P.2d 1247 (1976); *State v. Bly,* 215 Kan. 168.

The relevancy of the prior crime is based on factual similarities to the offense charged. Similarity of offenses is a key factor in relevancy. *State v. Faulkner,* 220 Kan. at 157; *State v. Cross,* 216 Kan. 511, 519, 532 P.2d 1357 (1975); *State v. Brown,* 4 Kan. App. 2d 729, 731, 610 P.2d 655 (1980). The record here amply demonstrates that the first incident is relevant in proving defendant's specific intent in the current prosecution. In both, the defendant gained access to the victims by entering the residence under the pretense of tuning the family piano; the ages of the victims were fairly close (5, 8 and 11); the defendant's touching of the victims occurred in the absence of adult witnesses; the touching was of the genital area of the victims; and finally, the crime charged in both was indecent liberties with a child. Thus, the two offenses are sufficiently similar for the prior offense to be relevant in proving defendant's intent.

The main argument advanced by the defendant pertains to the balancing test in admitting prior crimes evidence. He maintains that the probative value of the first offense is clearly outweighed by its prejudicial effect, and, therefore, should not have been admitted. As noted in *State v. Faulkner,* 220 Kan. 153, when specific intent is in issue, prior offenses may be very probative if sufficiently similar. See *State v. Fisher,* 222 Kan. 76, 563 P.2d 1012 (1977). The test of balancing probative value against prejudice rests in the trial court's discretion. *State v. Cross,* 216 Kan. 511; *State v. Bly,* 215 Kan. 168. An abuse of discretion standard requires this court to conclude that no reasonable person could have agreed with the trial court.

This panel expresses a great concern that the evidence was admitted. But based on the record before us

we are unable to say it was reversible error. Evidence was admitted that defendant had previously entered a plea of guilty to sexual abuse of a minor in Missouri. That evidence was properly admitted and defendant does not contend otherwise.

Based on the record before us we are unable to say the trial judge abused his discretion in not excluding the evidence on the basis that its prejudice outweighed its probative value.

Affirmed.

APPENDIX C

(Dated February 28, 1986)

IN THE SUPREME COURT OF THE STATE OF KANSAS

State of Kansas, Appellee,)
v.) No. 85-57727-A
George D. Buck, Appellant.)

You are hereby notified of the following action taken in the above entitled case:

PETITION FOR REVIEW.

DENIED.

Yours very truly,
LEWIS C. CARTER
Clerk, Supreme Court

Date February 28, 1986

APPENDIX D

K.S.A. 21-3503. **Indecent liberties with a child.** (1) Indecent liberties with a child is engaging in either of the following acts with a child who is not married to the offender and who is under 16 years of age:

(a) Sexual intercourse; or

(b) any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or satisfy the sexual desires of either the child or the offender or both.

(2) Indecent liberties with a child is a class C felony.

K.S.A. 60-445. **Discretion of judge to exclude admissible evidence.** Except as in this article otherwise provided, the judge may in his or her discretion exclude evidence if he or she finds that its probative value is substantially outweighed by the risk that its admission will unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered.

K.S.A. 60-446. **Character - manner of proof.** When a person's character or a trait of his or her character is in issue, it may be proved by testimony in the form of opinion, evidence of reputation, or evidence of specific instances of the person's conduct, subject, however, to the limitations of K.S.A. 60-447 and 60-448.

K.S.A. 60-447. **Character trait as proof of conduct.** Subject to K.S.A. 60-448 when a trait of a person's character is relevant as tending to prove conduct on a specified occasion, such trait may be proved in the same manner as provided by K.S.A. 60-446, except that (a) evidence

of specific instances of conduct other than evidence of conviction of a crime which tends to prove the trait to be bad shall be inadmissible and (b) in a criminal action evidence of a trait of an accused's character as tending to prove guilt or innocence of the offense charged, (i) may not be excluded by the judge under K.S.A. 60-445 if offered by the accused to prove innocence, and (ii) if offered by the prosecution to prove guilt, may be admitted only after the accused has introduced evidence of his or her good character.

K.S.A. 60-448. **Character trait for care or skill.** Evidence of a trait of a person's character with respect to care or skill is inadmissible as tending to prove the quality of his or her conduct on a specified occasion.

K.S.A. 60-455. **Other crimes or civil wrongs.** Subject to K.S.A. 60-447 evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his or her disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion but, subject to K.S.A. 60-445 and 60-448 such evidence is admissible when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

Supreme Court, U.S.
FILED
MAY 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1764

In the Supreme Court of the United States

October Term, 1985

GEORGE D. BUCK,
Petitioner,

vs.

STATE OF KANSAS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

RESPONDENT'S BRIEF IN OPPOSITION

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12 pp

QUESTION PRESENTED

WHETHER EVIDENCE OF A PRIOR EXTRINSIC OCCURRENCE, UPON WHICH THE DEFENDANT HAS BEEN TRIED AND ACQUITTED, SHOULD BE ADMISSIBLE AS EVIDENCE TENDING TO PROVE MOTIVE, INTENT, OR ABSENCE OF MISTAKE OR ACCIDENT IN A SUBSEQUENT CRIMINAL TRIAL.

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No. 85-1764

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GEORGE D. BUCK,
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STATE OF KANSAS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, the State of Kansas, respectfully requests that this Court deny the petition for writ of certiorari.

JURISDICTION

Respondent does not contest jurisdiction of the Supreme Court to decide issues related to double jeopardy as provided by the Fifth and Fourteenth Amendments of the United States Constitution, pursuant to 28 U.S.C. Sec. 1257(3).

REASONS FOR DENYING THE WRIT

Petitioner is not the first defendant to challenge the admissibility of the use of evidence from an acquittal in another prosecution.

State v. Darling, 197 Kan. 471, 419 P.2d 836 (1966) addressed this issue. In *Darling,* the state introduced evidence of a subsequent offense where there had been a charge and acquittal.

The court in *Darling* discussed a leading case, *Taylor v. State,* 174 Ga. 52, 162 S.E. 504 (Ga. Ap. Ct. 1931) overruled on other grounds, *Woods v. State,* 219 Ga. 509, 134 S.E.2d 8 (Ga. Sp. Ct. 1963) which commented that evidence that was insufficient to warrant a conviction may still shed light on a later case. Discussing the double jeopardy aspects *Taylor* made this comment:

> But the courts which have spoken upon the subject have all said, in substance, that he could not be put in jeopardy if a crime of which he has been acquitted, but that he was in jeopardy of the crime for which he was being tried; and that evidence of the transactions which had resulted in his acquittal was admissible if competent to show a fact material to the issue being tried. *Taylor,* 162 S.E. 511, 512.

Here the petitioner was charged with taking indecent liberties with Casey Eppler. He was not charged with crimes involving the Hinkle children. Thus, he was not twice put in jeopardy for the same conduct. Mr. Buck could not have been convicted or penalized for the *Hinkle* offenses in the second trial. See, *Supreme Court's Views of Fifth Amendment's Double Jeopardy Clause Pertaining to or Applied in Federal Criminal Cases,* 50 L.Ed.2d 830.

Petitioner argues that the rule of collateral estoppel applies. He relies on *Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), and *Wingate v. Wainwright,* 464 F.2d 209 (5th Cir. 1972).

In *Ashe v. Swenson,* the defendant was acquitted in a robbery involving six victims and three or four robbers. The prosecution could not prove that the defendant was one of the robbers. The issue was identity at the first trial and the State's evidence on that issue was woefully weak. After the acquittal, having used the first case in effect as a "dry run", the prosecution miraculously improved its identity evidence and the defendant was convicted of robbing another of the six victims.

Beginning with the premise that collateral estoppel is an ingredient of the Fifth Amendment guarantee against double jeopardy, the Court defined the former concept:

> It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the parties in any future lawsuit. *Ashe,* 397 U.S. at 443.

The Court went on to explain that:

> . . . the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. *Ashe,* 397 U.S. at 444.

Thus, it is clear there is not an absolute prohibition of acquittal evidence.

In *Ashe,* the issue was identity. The first jury concluded that the defendant was not one of the robbers. Under the precepts of collateral estoppel this precluded the prosecution from trying to show he was one of the

robbers for the *same* criminal conduct. Without a doubt, it would be wrong for the defendant to "run the gauntlet" again based on these facts.

At bar, the *Eppler* case and the *Hinkle* case involve separate instances of criminal conduct. This is not a case where the petitioner was tried and acquitted in the trial of one of the children and later retried for a second child who was present during the same incident.

After *Ashe* and *Wingate v. Wainwright,* Kansas decided *State v. Irons,* 230 Kan. 139, 630 P.2d 1116 (1981). *Irons* discussed both of these cases, followed the principles embodied in their decisions and ruled:

> Generally, it may be said that evidence, otherwise competent, of another crime committed by the accused is not rendered inadmissible per se by the fact the accused was acquitted of such crime. *Irons,* 230 Kan. at 140.

The Kansas court then reviewed *Darling* with approval. The court then extended the "balancing" test of *State v. Bly,* 215 Kan. 168, 523 P.2d 397 (1974), the leading case in Kansas regarding K.S.A. 60-455 evidence, i.e. evidence of other crimes. The court in *Irons* stated:

> Where a previous judgment of acquittal is based upon a general verdict this approach requires a court to examine the record of the prior proceedings, taking into account the pleadings, evidence, charge and other relevant matters, and if the court concludes a rational jury would have had to base its verdict of acquittal on the same issue which the state seeks to prove by introducing evidence of a prior offense then collateral estoppel applies. *Irons,* 230 Kan. at 143-144.

Here, the trial judge carefully followed the dictates of *Darling* and *Irons* by reviewing the record and transcripts of the *Hinkle* trial. The court properly found that the jury in the *Hinkle* case did not have to base its verdict upon the same issue which the State sought to prove in the *Eppler* case. The judge ruled the prior jury could have based its decision on the credibility of the Hinkle children or additional factors other than motive, intent, or lack of mistake or accident. The court allowed the State to introduce the *Hinkle* evidence on the issues of motive, intent, and lack of mistake or accident, pursuant to K.S.A. 60-455.

In child sexual abuse cases credibility of the child is of paramount importance. Many adults feel that children fantasize such experiences, while such is usually not the case. The trial judge carefully balanced the competing interests of prejudice versus probative value and correctly ruled that the *Hinkle* evidence should be admissible for the limited purpose of motive, intent, or lack of accident or mistake.

Petitioner attempts to make much of the Eleventh Circuit Case, *Albert v. Montgomery,* 732 F.2d 865 (11th Cir. 1984), which does nothing more than state the minority position. See *Evidence—Other Offense—Acquittal,* 86 ALR 2d 1132, and *Admissibility of Evidence as to Other Offense as Affected by Defendant's Acquittal of the Offenses,* 25 ALR 4th 934.

Finally, the jury was given a limiting instruction as to how to properly consider the *Hinkle* evidence. (See appendix A). This limiting instruction prohibited petitioner from being unduly prejudiced or having to twice "run the gauntlet" for the same criminal conduct.

CONCLUSION

For the reasons previously stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of May, 1986, I authorized service of three copies of the above Respondent's Brief in Opposition upon David R. Gilman and James F. Vano, 7134 W. 80th Street, Overland Park, Kansas 66204 and the Honorable Robert Stephan, Kansas Attorney General, Kansas Judicial Center, Topeka, Kansas 66612 by having the same, so addressed, deposited in the United States Mail, postpage prepaid.

STEPHEN R. TATUM

APPENDIX

APPENDIX A

INSTRUCTION NO. 6

Evidence has been admitted tending to show that the defendant committed crimes other than the present crime charged. This evidence may be considered solely for the purpose of proving the defendant's motive, intent, or absence of mistake or accident.